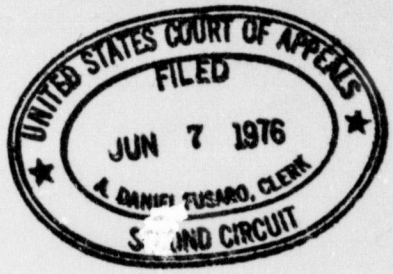
United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6115
76-6022
76-6081

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



DOCKET NO. 75-6115
DOCKET NO. 76-6022
DOCKET NO. 76-6081

THE STATE OF NEW YORK,

Plaintiff-Appellant,

-against-

THE NUCLEAR REGULATORY COMMISSION, and WILLIAM ANDERS as Chairman; THE ENERGY RESEARCH and DEVELOPMENT ADMINISTRATION and DR. ROBERT C. SEAMANS as the Administrator; THE DEPARTMENT OF TRANSPORTATION, and WILLIAM T. COLEMAN as Secretary of Transportation; THE DEPARTMENT OF STATE and HENRY A. KISSINGER as Secretary of State; THE CIVIL AERONAUTICS BOARD and ROBERT D. TIMM as the Chairman; THE FEDERAL AVIATION ADMINISTRATION and ALEXANDER P. BUTTERFIELD as the Chairman; THE UNITED STATES CUSTOMS SERVICE and VERNON B. ACREE as Commissioner and FRED R. BOYETT as Regional Commissioner,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-6115
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THE STATE OF NEW YORK,

Plaintiff-Appellant,

-against-

THE NUCLEAR REGULATORY COMMISSION, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

Preliminary Statement

This is a consolidated appeal from three orders of Hon. William C. Conner. The first, entered September 9, 1975,

denied the State of New York's motion of May 7, 1975, for a preliminary injunction. The second, entered December 23, 1975, dismissed the complaint with respect to the Civil Aeronautics Board ("CAB") and the United States Customs Service ("Customs"). The third, entered May 7, 1976, denied the State's motion of December 12, 1975, for a preliminary injunction and for summary declaratory and mandatory relief. The Court's memoranda have not been reported.

Issues Presented for Review

1. Did the plaintiff-appellant ("plaintiff") demonstrate a probability of success on the merits and a possibility of irreparable harm so to warrant granting a preliminary injunction regarding the air and related connecting transport of special nuclear materials ("SNM")?

2. Is the plaintiff entitled to summary judgment which declares that defendants-appellees ("defendants") have violated the National Environmental Policy Act of 1969

("NEPA") and the Council on Environmental Quality Guidelines on Preparation of Environmental Impact Statements ("CEQ Guidelines") and which directs that defendants promptly comply with the law?

3. Did the plaintiff's complaint set forth a valid claim against the CAB and Customs?

Statement of the Case

The Nature of the Case

Extremely large quantities of SNM* are being transported through the United States, including other metropolitan areas, via commercial air and related connecting transport (See for example A. 265-267).** The defendants have stated that shipments of SNM are increasing and project that such shipments will continue to increase thousands of times over what has been shipped in past decades (A. 273, 473-474). Despite the fact that NEPA, 42 U.S.C. § 4321 et seq., had

* SNM include, by regulatory definition, plutonium, uranium enriched in the isotope 233 or in the isotope 235 and any other material which defendant Nuclear Regulatory Commission may determine to be SNM. See, 42 U.S.C. § 2014(aa).

** The prefix "A" denotes references to pages of the three volume Joint Appendix and the first volume of the two volume Supplemental Appendix.

become effective in 1969, it was determined that no federal agency, either by itself or in conjunction with other involved agencies* had ever complied with the provisions of NEPA by preparing and filing any environmental impact statements which assessed the risks and impacts of, and alternatives to, the air transport and related connecting transport of SNM to, from, in and over the City and State of New York and to, from, in and over the United States and its territories (A.14-15). It subsequently became clear that the responsible federal agencies had no intention of utilizing alternative modes of transport until full NEPA review and assessment had been completed (A. 61-83, 230).

On May 5, 1975, the State of New York instituted this action by verified complaint (A.7). This action seeks a judgment permanently enjoining, annulling and setting aside all present and future licenses, approvals and other actions of defendants, their agents, servants and employees and all persons in active concert and participating with them which, directly or indirectly, permit or execute the transport by air

* See pp. 7-9 infra.

and related connecting transport of SNM to, from, in, and over the City and State of New York and the United States and its terrorities because of violation of NEPA. It seeks as well a judgment declaring that the defendants' actions, in licensing, approving, allowing, or executing, directly or indirectly, the transportation by air and related connecting transport of SNM, without having completed and filed final environmental impact statements with the Council on Environmental Quality ("CEQ") concerning such transport of SNM to, from, in or over the City and State of New York and the United States and its territories, are in violation of NEPA and the CEQ Guidelines 40 CFR § 1500 et seq. (A.20-21).

The Proceedings and Disposition Below

On May 7, 1975, plaintiff made a motion for an order preliminarily enjoining, annulling, and setting aside, pending final determination of this action, all of the above mentioned actions of defendants and directing defendants to forthwith instruct nuclear materials shippers, air and other carriers, and other persons and entities procuring or executing the transport in question that such preliminary injunction would be in effect. Four months later, without an

evidentiary hearing, Hon. William C. Conner denied the motion in a Memorandum and Order (A. 895) filed on September 9, 1975.

By Notice of Motion (A. 914) dated August 15, 1975, the CAB and Customs moved to dismiss the complaint with respect to those defendants on the ground that it fails to state a claim upon which relief can be granted and, with respect to the CAB, on the ground that it fails to state a claim over which the court had jurisdiction. In a Memorandum and Order (A. 922) filed on December 23, 1975, Judge Conner granted the motion.

Prior to the order of dismissal of December 23, 1975, the State made a new motion on December 12, 1975, for an order preliminarily enjoining, annulling, and setting aside all present and future licenses, approvals and other actions of the defendants which, directly or indirectly, permit or execute the transport by air of plutonium and the commercial air transport and related connecting transport of enriched uranium (other than uranium enriched in the isotope U-233*) (A. 1023). The State moved as well for summary judgment which declares that defendants' above-

* No relief was sought with respect to U-233 since the State is unaware of any immediate plans to transport such material by air.

mentioned actions, without having prepared, circulated for comment, and filed adequate final environmental impact statements concerning the air and related connecting transport of SNM, are in violation of NEPA and the CEQ Guidelines, and which directs that defendants make available a draft generic environmental impact statement concerning the air and related connecting transport of SNM by a date certain, that defendants hold hearings and accept comments on the draft, and that defendants file an adequate final generic environmental impact statement by a date certain.*

Three and one-half months later, on May 7, 1976, Judge Conner denied the summary judgment motion and, as will be seen below, in effect denied the motion for a preliminary injunction.

The Facts

Defendants' Activities

Defendant Energy Research and Development Administration ("ERDA") itself makes domestic and international air shipments of SNM (A. 232-33). During one six month period there were 400 domestic SNM air shipments by ERDA (A. 233).

* The State originally had specified that the defendants should be directed to issue the draft by December 31, 1975, to hold hearings thereon during March, 1976, in various parts of the country including New York City, to accept comments through March 31, 1976 and to file the final statement by June 21, 1976.

The Nuclear Regulatory Commission ("NRC") issues licenses to persons which permit the import, export and domestic transport of SNM; such licenses do not restrict the mode of transport to any particular form. Between January 1972 and April 1975, most of the 103 licensed import shipments, including 87 enriched uranium shipments, were by air (A. 238, 272). Almost all of the significant quantities of highly enriched uranium and plutonium imported in 1974 were transported by air (A. 272).

Defendant Department of Transportation ("DOT") regulates shipping container design for domestic and international transport of SNM. 49 C.F.R. Parts 170-79 (1975); 46 C.F.R. Part 146 (1975). The Federal Aviation Administration ("FAA") regulates labeling, inspection and other aspects of air transport of SNM. 14 C.F.R. Part 103 (1976).

The CAB regulates air transport of SNM, inter alia, by passing upon tariff applications (A. 917), by granting certificates of public convenience and necessity and by assuring that air carriers have valid NRC licenses or qualify for an exemption and that DOT/FAA or NRC regulations have been complied with. It is charged with the policy of promoting air safety.

Defendant Department of State negotiates international agreements of cooperation approving a policy of exchange of nuclear materials and technology abroad, including the import and export of SNM for non-defense purposes (A. 10).

Customs clears and permits the entry into the United States of air transported SNM (A. 39, 483) and assures that air carriers have valid NRC licenses or qualify for an exemption and that DOT/FAA or NRC regulations have been complied with.

None of the defendants have completed and filed any final environmental impact statements regarding the air and relating connecting transport of SNM (A. 892), as required under NEPA.

The Dangers to Human Life

Air shipments of SNM greatly endanger human lives in two principal ways:

a) the possibility of terrorist or criminal activities directed toward SNM in the course of commercial air and related connecting transport resulting in

i) deliberate dispersal of materials or radioactivity or

ii) manufacture and use of nuclear explosive devices and

b) the possibility of an aircraft accident resulting in a release of SNM.

Terrorism

The hazards of air shipment of SNM include, quite apart from the release of plutonium in an accident, the possibility of terrorist or other criminal activities directed toward SNM in the course of air and related connecting transport. Air transport of SNM has meant, for the most part, commercial air transport.

As admitted by defendants,

> "The adequacy of safeguards against, diversion, theft or sabotage has become increasingly important since a few tens of kilograms of plutonium, uranium-233 or uranium-235 are enough for one or more nuclear explosive devices. Since plutonium is highly radiotoxic, it could also be used in quantities of less than one kilogram as a contamination or health threat." (A. 474)

Defendants further admitted that there has been a recent increase in terrorist activity, that information is available to the public on methods for constructing nuclear explosives,

and that there has been an increase in the number of SNM shipments (A. 427).

Two individuals assessed the terrorist threat on behalf of the State for the District Court. Theodore T. Mason is a management consultant who has made master plans for air cargo operations in this country and for design and construction of new air terminals in Sweden. He is as well a Commander in the Naval Reserve and Commanding Officer of a Mobile Inshore Undersea Warfare Unit with considerable experience in systems analysis as applied to military problems and a knowledge of tactics and weapons for paramilitary terrorist groups (A. 971-972). Robert R. Leamer is a consultant in the areas of engineering research and construction planning and demolition supervision. He is also a Lieutenant Commander in the Naval Reserve with expertise in paramilitary terrorist techniques and counterinsurgency methods. Between 1962 and 1964 Mr. Leamer assessed terrorist techniques and countermeasures for the U.S. Navy SEAL teams in Viet Nam (A. 973-974, 949-950).

It was demonstrated below that, with any amount of effort at all, a terrorist group could obtain detailed information regarding expected air shipments of SNM (A. 950). At least 124 people in eleven public and private agencies knew

the details of a particular air shipment before it occurred (A. 136-37, 936-38).

Messrs. Mason and Leamer carefully analyzed the safety of commercial air transport and airport security in their affidavit of June 15, 1975 (A. 949) and showed that commercial air transport is particularly vulnerable to terrorist attack:

(a) planes can easily be shot down by one man with a small hand held weapon;

(b) planes can be destroyed by remote control demolition devices;

(c) cargo planes can be hijacked.

Indeed, one scenario for an attack on commercial air transport hypothesized by Mason and Leamer in their sealed affidavit of June 16, 1975 actually had been attempted by Arab terrorists in Italy. Moreover, the terrorists, before their scheme was aborted in the last hours, had prepared to use the very hand-held weapons that Messrs. Mason and Leamer informed the Court below were ideally suited for such attacks (A. 1039).

There is clearly a substantial likelihood that a highly motivated terrorist group could successfully attack a

shipment of SNM in commercial air and related connecting transport (A. 950). Existing safeguards regulations and practice admittedly are inadequate (A. 118, 950, 965-68). Indeed, a Special Safeguards Study for the NRC admitted that terrorists are known to have the capability of executing successful sophisticated attacks on transportation (A. 87). The NRC has also admitted that there has been a recent increase in terrorist activity (A. 427, 465).

If a terrorist or criminal band is successful in attacking a shipment of SNM, it has, depending on the type of SNM, a number of options available to it.

In the case of plutonium, because of its high toxicity, deliberate dispersal in air or water by a variety of means is one possible terrorist option, which will not be detailed in this brief. The Court is requested to consult the relevant portions of the sealed Affidavits in the Appendix on this issue (A. 939-48, 950, 958-60, 964-65).

Another terrorist option involves the seizure of SNM for the manufacture of a nuclear explosive device. The nuclear explosive option involves both plutonium and uranium enriched in the isotope U-235 (A. 988-991, 983). Even uranium which some would not consider "highly enriched" is extremely valuable for manufacture into a nuclear explosive device (A. 988-91). Again, there is a substantial likelihood that terrorists could seize SNM for this purpose while in commercial air and related connecting transport (A. 950). There is agreement that information is available to the public on methods for constructing nuclear explosives (A. 86, 427, 990). There is also agreement that terrorist groups are likely to have the technical knowledge to use such information to build a nuclear explosive device (A. 87, 962-64, 136, 935, 988-991). Even if a group had not actually produced such a device, the mere fact that it had seized the SNM would give it extraordinary black-mail capabilities (A. 955).

The Special Safeguards Study for the NRC previously referred to, and annexed to the State's complaint, found that

the level of danger to the public from potential acquisition of SNM by terrorists was large and growing (A. 118). It also found that the level of safety achieved thus far was entirely inadequate (A. 118) and out of proportion to the level of danger (A. 88).

The finding by Mason and Leamer that present regulations are, in many respects, inadequate to deter or prevent a diversion or loss of SNM in commercial air and related connecting transport was confirmed by a report prepared for the NRC, released in December 1975, MITRE Technical Report 7022, September 1976, The Threat to Licensed Nuclear Facilities ("MITRE Report")(A. 1174-1178). The MITRE report confirmed findings, stated in earlier affidavits of Mason and Leamer, regarding the inadequacies of requirements regarding visual surveillance, communications, numbers and arming of guards (A. 1175). The thrust of the present NRC regulations is to protect against loss, misrouting and only casual theft. Mason and Leamer concluded:

> "Assuming full compliance with the letter and the spirit of [the NRC regulations] by all responsible parties (an assumption with which we disagree), the amended regulations do not provide for adequate personnel equipment or procedures to effectively deter and prevent successful terrorist action or organized theft". (A. 1176).

The MITRE Report confirmed as well the findings of Captain James A. Eckols, submitted on behalf of the State, that the transportation industry is under a stranglehold of organized crime, corruption, and employee collusion* (A. 1178, 1047-1049), Captain Eckols is the Chairman of the Hazardous Materials Committee of the Airline Pilots Association.

The MITRE Report corroborated as well Captain Eckols statements as to the incidence of terrorist acts directed toward commercial air transport, there having been no less than 26 commercial aviation related terrorist acts in the last 6 years (A. 1043-1044, 1175). Indeed, carriage of SNM in commercial aircraft provides terrorists with an additional incentive to act against such transport (A. 1176).

For these and other reasons Captain Eckols concluded that

> "If these materials must be moved by air transportation, they should be moved by military personnel, in military aircraft from military airports that do not constitute a hazard to the public." (A. 1045).

* At one point, Captain Eckols underscored the incompetency of the transportation industry by recounting an incident involving an air shipment of enriched uranium which was lost under a load of shoes for nine days until a shoe store, tracing its consignment of shoes, found the shoes and the uranium (A. 1047).

The continued shipment of uranium and plutonium via commercial air transport involves, in Captain Eckols' opinion, "an imminent and severe danger of catastrophic harm" (A. 1045).

Without any contest by the defendants, Mason and Leamer demonstrated for the Court below that the U.S. military has the safeguards capability to move SNM by surface transport which is significantly less vulnerable to terrorist attack than commercial air transport and related connecting transport (A.968-970).

Since uranium shipments do not present the same toxic threat as plutonium and therefore do not present the same air accident hazard the relative vulnerability of commercial air and military assisted air transport options for enriched uranium shipments also was assessed. Mason and Leamer established, again without any contest by defendants, that there were five military assisted transportation alternatives for enriched uranium that are far less vulnerable to terrorist action than present commercial transport (A. 1034-1038). The least vulnerable alternative was that utilizing long haul military air cargo, leaving from and flying into a military airfield, and connecting with short

haul military helicopter service between the airfield and the origin/ultimate destination (A. 1034, 1036-1037).

It is significant to note that not once throughout all the proceedings below did defendants contest the rationale and findings of Mason and Leamer on this subject of safeguards and alternatives.

Aircraft Accidents

The particular type of SNM which would have disastrous consequences in the event of a release in an air accident is plutonium.* Plutonium is one of the most deadly substances in existence. In its various forms, plutonium is highly radiotoxic (A. 474, 615-18, 640-697, 790-830, 387-423).**

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* U-233, another form of SNM, would also have such consequences but as stated above, we are unaware of any immediate plans to transport such material by air. Of course, the psychological impact in a large metropolitan area of a release of virtually any form of SNM is a matter that must not be overlooked.

** While the affidavits submitted by plaintiff on the point show that the analyses of plutonium toxicity by defendants are erroneously conservative, even defendants admit that death by radiation is caused within a few days by 260 micrograms of reactor plutonium deposited in the human lung (A. 393-394). As little as .01 micrograms of reactor plutonium in the lung can cause death within a 15 to 45 year period after inhalation (A. 393).

Affidavit testimony was submitted on behalf of the State by Irving Pinkel, former Director of the NASA Aerospace Safety Research and Date Institute, an expert in air crash survivability analysis. Mr. Pinkel has, in addition to his 32 years with NASA, served as a principal investigator of the Apollo spacecraft fire and Apollo 13 explosion (A. 619-620). More recently he was part of the team investigating the fire and shutdown of the Browns Ferry nuclear power plant in Alabama. While at NASA Mr. Pinkel helped design packages to bring back radioactive materials from moon shots, which packages were to survive high heating of atmospheric reentry and impact in event of flight abort.

Mr. Pinkel stated:

> "It is my view that the containers for the shipment of special nuclear materials are inadequately engineered to protect against the spill-threat of these materials involved in air-plane shipment." (A. 620)

He pointed out that containers designed and currently authorized for the transport of plutonium have been breached by levels of test crash environment intensities which are significantly less severe than actual air

crash environments (A. 316-85,624, 707). In fact, during test drops done for NRC at speeds of only 130 feet per second, even the inner pressure vessels were caused to leak (A. 717, 316-85). A Sandia Laboratory Report, "Special Tests for Plutonium Shipping Containers", prepared for the NRC (A. 316-85), candidly admits that, if impact speeds were raised to 150 feet per second, spillage of nuclear material would be likely (A. 624, 316-85).

The NRC has admitted that NRC test impacts would in fact be exceeded in at least 22% of all aircraft accidents (A. 293) and that NRC fire test levels would be exceeded in severity in at least 30% of all actual crash fires (A. 294). There has been no change in integrity design of such containers since 1968 (A. 287).

According to Mr. Pinkel, the containers now in use by defendants, their agents and licensees are clearly <u>not</u> designed from a complete knowledge of the air crash environment (A. 628). For example, no thought has been given in the design of the containers to the potential of penetration damage due to shrapnel-like fragments of disintegrating airplane components resulting from an air accident (A. 625).

Defendants, unlike Mr. Pinkel, also do not advert to mid-air disasters resulting from decompression, explosions or collisions. Present plutonium containers deal only with a few of the threats in air transport and "for these the magnitude of the threat has been underestimated" by the defendants (A. 624).

Indeed, the United States Environmental Protection Agency ("EPA") has concluded that more stringent standards for the design and fabrication of these types of packaging, as well as performance tests at more stringent levels, need to be adopted (A. 316-85, 754-55).

Dr. Seville Chapman, formerly of the Cornell Aeronautical Laboratory, was in agreement with Mr. Pinkel when he concluded, in an affidavit submitted on behalf of the State, that given the present containers, there is no assurance of containment of materials in some air crash environments, which are clearly more severe than accidents in other modes of transport (A. 699-700).

Mr. Pinkel concluded that continued use of such containers in air transport jeopardizes human life (A. 628). The use of this type of technology for containment is, according to Mr. Pinkel, "tantamount to negligence" (A. 628).

Once a container is breached in the environment of an air crash, it is undisputed among the experts that some of the plutonium content possibly will be released (A. 400-401, 143-73).

The consequences of a release would be devastating. Even the NRC admits that, if there is a dispersal of 10,000 curies of plutonium with all particles being of inhalable size in an area with a population density of 10,000 per square mile, from 963,080 to 4,844,077 persons would inhalf plutonium under various meterorological conditions (A. 414-22).

Dr. John Gofman, the Plutonium Group Leader within the Manhattan Project during World War II, and developer of two processes for the chemical separation and purification of plutonium, submitted an affidavit on behalf of the State in which he analyzed plutonium disposal. He predicts even greater damage than the NRC (A. 649-50, 791). He computed that, under one set of hypothetical conditions for release of plutonium (Case A), all 8,000,000 people in New York City will die of lung cancer save for intervening causes of death. This

would result from a dispersal of only 1 1/4 kilograms or 2 3/4 pounds of plutonium.* Under another set of hypothetical conditions (Case B), 2,650,000 people will die and, under a third set (Case C), 6,300,000 people will die.

A highly dangerous possibility after a release of plutonium is a resuspension of plutonium dust (A. 650). In an affidavit in support of the State's position, Dr. Karl Z. Morgan, director of the former Atomic Energy Commission's Health Physics Division at Oak Ridge National Laboratories from 1943 to 1973, pointed out that, after a chemical explosion at Oak Ridge National Laboratories, he had directed that the nearby roadsbe tarred and buildings be spray-painted to hold down the plutonium. The roads were taken up and the buildings sawed down, piece by piece, and buried in plastic bags, hardly an insignificant procedure if it had to be applied to midtown Manhattan (A. 617).

Plutonium dispersal in Spain required the stripping of 600 acres of vegetation and 5 1/2 acres of topsoil, all of which was sent to the United States to be buried at a cost of several hundred million dollars. In Thule,Greenland, after the crash of an Air Force plane resulting in a plutonium spill,

* Dr. Marvin Resnikoff, a physicist who submitted affidavits on behalf of the State, stated that, for calculational purposes, 1 1/4 kilograms out of a 48 kilogram shipment of plutonium dioxide was not an unreasonable projection for a release (A. 149-50).

sixty-seven 25,000 gallon tanks of snow and ice had to be collected, aside from other contaminated debris (A. 583). If an air crash occurred in a metropolitan area, for example, San Francisco, Los Angeles, or New York, evacuation of the entire city would perhaps be necessary (A. 650).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING PLAINTIFF'S PRELIMINARY INJUNCTION MOTIONS.

A. The Chronology of the Preliminary Injunction Motions

Before initiating this action, plaintiff had been informed in a letter from the NRC that the NRC intended to prepare an environmental impact statement in connection with an intended rule making proceeding covering the air transport of SNM and plaintiff attached a copy of the letter to its complaint (A. 82-83). Like many NEPA suits involving the environmental impact statement requirements, this suit in large measure is about time. This suit deals with the period of time before the defendants eventually may file adequate final environmental impact statements. It seeks to determine whether the defendants may take major federal actions significantly affecting the environment during that period.

The District Court has failed to grasp the purpose of NEPA, of this lawsuit and of the preliminary injunction motions. In the District Court's memorandum of May 7, 1976, it referred to the ultimate objective of the lawsuit as being simply prompt compliance by the defendants with the requirement of NEPA and the CEQ Guidelines to file an environmental impact statement (A.1193).

As recently as May 20, 1976, the District Court declared:

> "This case appears to have been filed for public relations purposes and not to accomplish any legitimate purpose. The avowed purpose of the lawsuit was to get the filing of an environmental impact statement. When it becomes apparent that the responsible agencies are proceeding to prepare an environmental impact statement with apparent dispatch, you want to suppress that fact." (A. 1224)

Plaintiff made its first motion for a preliminary injunction on May 7, 1975, immediately after bringing this action. Although the principal focus at that time was on plutonium, plaintiff sought to enjoin all air and related connecting transport of both plutonium and uranium.

Since a purpose of the impact statement requirement is to assure that federal agencies adequately analyze and evaluate the environmental impacts of, and alternatives to, such actions before taking them, plaintiff maintains that it is critical that such actions not be taken before analysis and evaluation is completed and adequate final impact statements are filed.

At the same time, plaintiff asked for a temporary restraining order pending determination of the preliminary injunction motion and pointed out that international and domestic air shipments of SNM under NRC license and by ERDA would take place in the immediate future (A. 15, 123-24). The District Court refused to grant the temporary restraining order (A. 199) even though plaintiff's statements regarding such shipments to take place in the immediate future were for the most part uncontroverted (A. 204-206).

Between the time of the making of the first preliminary injunction motion and time of its denial, various events occurred.

By May 12, 1975, at a conference in the chambers of Hon. William C. Conner, it had become apparent that, if an

evidentiary hearing on the preliminary injunction were held, the hearing might take 4-6 weeks. Judge Conner indicated that the earliest time he could have such a hearing would be in August 1975. By June 25, 1975, the defendants had filed answering papers on the preliminary injunction motion and plaintiff had filed reply papers. At a conference on July 3, 1975, both parties indicated the desire that the District Court decide the motion on the papers, if possible, scheduling an evidentiary hearing only if necessary, and the Court undertook to do so (A. 778-799).

By letter dated July 17, 1975, plaintiff informed the Court that it had only recently learned that on July 9, 1975, a shipment of 45.062 kilograms of highly enriched uranium 235 had been transported by air from John F. Kennedy Airport under NRC license, and emphasized the immediacy of the need for a preliminary injunction (A. 788-89).

Thereafter, in a letter dated July 24, 1975, plaintiff respectfully requested that, if Judge Conner would be unable to make whatever determination he deemed appropriate on the papers prior to his vacation, which was to begin in August, the case be reassigned to a judge who would be able to make a promptdetermination of the preliminary injunction

motion, citing, among other things, Rule 4(c) of the Individual Assignment and Calendar Rules for the Southern District (A. 1020-22). In a conference on July 25, 1975, the District Judge expressed his belief that recourse to the Assignment Committee would not be helpful and stated that he could not give any assurance when he would decide the motion (A. 844-49).

On July 31, 1975, plaintiff brought to the District Court's attention that two "shipments" of uranium hexafluoride, one of 150.453 kilograms with 79.7% U-235 enrichment and one of 8.86 kilograms with 77.3% U-235 enrichment, were expected to be transported on one flight and again moved for a temporary restraining order pending determination of the preliminary injunction motion (A. 984-87). At a conference on August 20, 1975, Judge Conner denied the motion (A. 887).

Finally, on September 9, 1976, more than four months after plaintiff made its motion for a preliminary injunction, the District Court denied the motion. The District Judge had not found that an evidentiary hearing was necessary and indeed stated in its opinion that he was led "inexorably" to his conclusion that a preliminary injunction should not issue (A. 906). Plaintiff took a timely appeal from that order.

When plaintiff made its first preliminary injunction motion the principal focus had been on plutonium. Nevertheless, plaintiff had sought the same relief as to both plutonium and uranium, namely, the cessation of all air and related connecting transport. By the time the first motion was denied, events had focused increasing attention on uranium transport. Plaintiff separately considered the preliminary relief which it now regarded as necessary with respect to uranium, a substance which does not present the same toxic threat and air accident hazard as plutonium. Plaintiff concluded that cessation of all commercial air transport of uranium might be sufficient to protect against the hazard which current air transport of uranium does present, namely, the threat of terrorist or other criminal activities.

After consulting with Messrs. Mason and Leamer on the subject of uranium transport and obtaining additional information regarding the transport of both plutonium and uranium from Captain Eckols, plaintiff made a second motion for a preliminary injunction based upon additional affidavits by these persons, as well as upon the papers submitted on the first motion. In this motion, made on December 12, 1975,

plaintiff continued to seek cessation of all air and related connecting transport of plutonium but sought cessation of only commercial air and related connecting transport of uranium.

In an affidavit submitted by defendants in January, 1976, Robert F. Barker of the NRC estimated that a final environmental impact statement would be filed in October 1976 (A. 1166). The last affidavits on the second preliminary injunction motion are filed on January 23, 1976. However, the Court did not . .e on the motion until May 7, 1976, some three and one-half months later.

Although the District Court characterized the difference between the two preliminary injunction motions as "de minimus" [sic] (A. 1203), it now inexplicably concluded that an evidentiary hearing was required (A. 1200). Plaintiff had requested that a decision be made without a hearing (A. 1189). Defendants also believe that an evidentiary hearing is not required. Letter, dated May 11, 1976, from Charles F. Richter, Assistant U.S. Attorney, to Nathaniel Fensterstock, Court of Appeals Staff Counsel, p. 3.

A principal point of this suit and the only point of the preliminary injunction motions relates to whether the defendants can take major federal actions significantly affecting the environment during the time before they may eventually file adequate environmental impact statements assessing the impact of, and alternatives to, those actions. The direction at this late date for a lengthy evidentiary hearing amounts to a denial of the second preliminary injunction motion. This is particularly true since the District Court has made numerous errors of law in interpreting NEPA and since, even on the undisputed evidence, a preliminary injunction is required, as will be discussed below.

However, the District Court decided that it could not even have the hearing without leave of the Court of Appeals* (A. 1204). The District Court concluded that

* It is significant, in light of the history of these motions, that the District Court did not say that, if leave were granted, it would have an immediate hearing but merely that "[a] date for an evidentiary hearing will be set immediately...." (A. 1204).

the second injunction motion should be treated as a motion to reopen the Court's ruling on the first motion and that the case law required that, absent permission of the Court of Appeals, the District Court not grant such a motion (A. 1201-4). Plaintiff maintains that the District Court erred as a matter of law.

The second preliminary injunction motion is a new motion; it is not a motion to reopen the Court's ruling in the first motion. If the difference between the two motions really was de minimis,as the Court indicates, one wonders why it took the Court three and one-half months after the last affidavit was filed to decide the second motion and why the Court decided at that late date that an evidentiary hearing was required, although it had not been required on the first motion.

The District Court clearly had jurisdiction over the second motion, which was made pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. Ideal Toy Corp. v. Sayco Doll Corp., 302 F. 2d 623 (2d Cir., 1962), cited by the District Court, is not authority to the contrary. Unlike here, the Court in Ideal Toy had granted an injunction and thereafter

was asked to vacate that very injunction. Moreover, in that case, the motion to vacate was treated as a motion pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. Whatever may or may not be the proper interpretation of Rule 62(c), such interpretation has no bearing on this Rule 65(a) motion.

The District Court also erroneously relied upon Turner v. H.M.H. Publishing Co., 329 F. 2d 136 (5th Cir., 1964). There the District Court had granted a preliminary injunction against defendants. The defendants filed a motion to amend the findings of the District Court and to amend the injunction accordingly under Rule 52(b) of the Federal Rules of Civil Procedure and later on the same day filed a notice of appeal. Thereafter, the District Court amended the preliminary injunction but no notice of appeal from that order was filed. The Fifth Circuit, although referring to the Ideal Toy case, held that, pursuant to then Rule 73(6) of the Federal Rules of Civil Procedure, the filing of the Rule 52(b) motion terminated the running of the time for appeal from the grant of the injunction, that therefore the notice of appeal

was premature, and that the appeal had to be dismissed. This holding is simply not apposite to the case at bar.*

Plaintiff maintains in Argument I that the District Court erred in denying plaintiff preliminary injunctive relief because:

1. Defendants' admitted failure to file environmental impact statements is a violation of a clear, non-discretionary legal duty under NEPA.

2. Defendants' violation of their duty under NEPA itself constitutes irreparable harm and requires the issuance of a preli..inary injunction.

3. Even if defendants' violation of NEPA itself would not require issuance of a preliminary injunction, the facts admitted by defendants alone, as well as all the facts, amply demonstrate the possibility of irreparable harm and require the issuance of a preliminary injunction.

4. Even if the possible irreparable harm is balanced against the claimed effects of a prelminary injunction, the issuance of a prelminary injunction is required on this record.

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* The Fifth Circuit has subsequently refused to follow the holding in Turner. Stokesv. Peyton's Inc., 508 F. 2d 1287 (5th Cir., 1975).

B. Defendants' admitted failure to file environmental impact statements is a violation of a clear, non-discretionary legal duty under NEPA.

With the exception of the CAB and Customs, which moved to dismiss the complaint with respect to them, the defendants have not seriously contested that they have violated NEPA by failing to file environmental impact statements.

Indeed, the NRC, in giving notice that it will prepare an impact statement, conceded the applicability of NEPA when it declared:

> "The statement will be directed at air transportation. However, other transportation modes -- land and water transport -- will be considered in light of the requirement of the National Environmental Policy Act of 1969 (NEPA) that the relative costs and benefits of alternatives to certain proposed Federal actions be fully considered" 40 Fed. Reg. 23768, 23769 (1975) (Emphasis supplied).

Moreover, in a NRC notice, dated March 24, 1976, when the NRC finally announced that a draft impact statement had been made available, it declared that the statement had been prepared "pursuant to the National Environmental Policy Act of 1969". 41 Fed. Reg. 12937-38 (1976).

This concession of the applicability of NEPA is not surprising in light of the concern expressed by the EPA, which noted:

> "Since an aircraft accident involving plutonium could potentially lead to serious environmental and public health effects, we believe that steps should be taken to assure protection of the public health and the environment in conducting these shipping activities.
>
> . . . To our knowledge, however, there exists no specific assessment of the risk involved in transporting plutonium, or for that matter, other radioactive materials routinely in air commerce. Thus, we are unable to make judgments regarding the relative risks of this transportation. Probably the most immediate problem lies in estimating the potential consequences of an aircraft accident occurring in a major metropolitan area, such as the New York City area.
>
> We believe that before the commercial air transportation of plutonium becomes widespread, it would be prudent from a public health standpoint for NRC to examine the risk involved in such transportation in detail". (A.602-03).

Indeed, there could be no serious argument against the applicability of NEPA. It provides that "all agencies of the Federal Government" shall file a detailed environmental impact statement prior to every "major federal action significantly affecting the quality of the human environment". 42 U.S.C.A. § 4332(2)(c) [set forth in Addendum "A"]. The CEQ Guidelines require that a statement is to be prepared even where federal actions are localized in impact, if there is a potential that the environment may be significantly affected. Moreover, actions, the impact of which is likely to be highly controversial, should be covered in all cases. 40 C.F.R. § 1500.6.

In this regard it is helpful to consider the CEQ Guidelines' declaration as to the scope of the word "action":

> "§ 1500.5 Types of action covered by the Act.
>
> (a) 'Actions' include but are not limited to:
>
> * * *
>
> 2. New and continuing projects and program activities: directly undertaken by Federal agencies; . . . or involving a Federal lease, permit, license certificate or other entitlement for use.

> 3. The making, modification, or establishment of regulations, rules, procedures, and policy".
> 40 C.F.R. § 1500.5.

Regarding the definition of "major federal action", the CEQ Guidelines state in part, at 40 CFR § 1500.6:

> "Identifying major actions significantly affecting the environment.
>
> (a) The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. . .. In considering what constitutes major actions significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur. . . when several Government agencies individually make decisions about partial aspects of a major actions."

The courts have construed the standard of "major action significantly affecting the human environment" broadly and have held that federal action did not meet that standard in only a very few cases. Yarrington, The National Environmental Policy Act, Monograph No. 17, pp. 22-23 (1974)

in 4 BNA Environment Reporter, No. 36. For example, NEPA has been applied to Federal Power Commission licensing of the construction and operation of a pumped storage hydro-electric project. Scenic Hudson Preservation Conference v. FPC, 453 F. 2d 463 (2d Cir., 1971), cert. den. 407 U.S. 926 (1972). NEPA has also been applied to Atomic Energy Commission issuance of an interim operating license for a nuclear power plant. Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D. D.C., 1971). NEPA also has been held to apply to federal decisions which permitted some other party -- private or governmental -- to take action affecting the environment, even where no license as such was at issue. See, Scientists' Institute For Public Information Inc. v. A.E.C., 481 F. 2d 1079 (D.C. Cir., 1973).

In admittedly failing to file environmental impact statements, defendants have violated a clear, non-discretionary legal duty. See, Izaak Walton League, supra, at 291, 293, 295.

Although, the defendants, except CAB and Customs, who will be treated in Argument III below, all but formally conceded their violation of the law, the District Court, in its

decision on the first preliminary injunction motion, merely assumed "'arguendo' that plaintiff has shown a sufficient likelihood of ultimate success" (A. 897). In its decision on the second motion, the Court again assumed that plaintiff can satisfy the test of "probable success on the merits" and pointed out that defendants had not posited any argument to the contrary (A. 1206, n. 5).

As matter of law, plaintiff has more than met the preliminary injunction test of "probable success on the merits" recently applied by Hon. Robert J. Ward in enjoining the construction of a postal facility because of claimed violation of NEPA. See, Chelsea Neighborhood Ass'ns. v. U.S. Postal Service, 389 F. Supp. 1171 (S.D.N.Y.) affd. 516 F. 2d 378 (2d Cir., 1975). Here success on the merits is not merely probable but certain. This is the kind of case referred to by Frederick R. Anderson of the Environmental Law Institute when he noted:

> "In some NEPA suits, however, the courts have been able to leapfrog the factor of plaintiffs' likelihood of eventual success regarding NEPA's applicability, because even at the hearing on the preliminary injunction the court was virtually certain what its final ruling on the law would be." Anderson, NEPA in the Courts 239 (1973)

C. Defendants' violation of their duty under NEPA itself constitutes irreparable harm and requires the issuance of a preliminary injunction.

In all but a few extraordinary cases, where NEPA was violated the courts have enjoined the actions in question until NEPA is complied with. See, Anderson, op. cit. supra at 239; Comment, 60 Iowa Law Rev. 362, 366, 373 (1974).

Plaintiff maintains that the violation of NEPA, in this case by the total failure to file any final environmental impact statements itself constitutes sufficient irreparable harm to require issuance of a preliminary injunction. This harm lies in the simple fact that, without the injunction, major federal action significantly affecting the environment will continue without prior compliance with the careful and informed decision - making process required by NEPA.

This position has been powerfully stated by the Seventh Circuit in Scherr v. Volpe, 466 F. 2d 1027 (7th Cir. 1972), in which the Court affirmed the granting

of a preliminary injunction stopping the construction of a highway because of the failure to file a NEPA statement. The court held:

> "Next the defendants submit that the injunction should not have issued inasmuch as the plaintiffs failed to show that the construction of Highway 16 would result in irreparable harm to the environment. The defendants' argument in this respect proceeds from the premise that even though there be a clear violation of the Act, even though, as the district court stated, the responsible federal agency failed to 'assemble all pertinent information, to subject it to expert scrutiny and to articulate clearly and in writing an evaluation of the various benefits and costs which are being balanced', that no judicial relief may be afforded the plaintiffs absent a showing on their part that the project would be damaging to the environment. We think the district court's rejection of this theory is particularly relevant: 'to suggest that when the federal agencies flatly fail to perform this function, a plaintiff in a lawsuit such as this suit must perform it as a condition to obtaining injunctive relief is to suggest that one of the central purposes of the Act be frustrated'. To accept the defendants' argument on this point would thwart the Congressional mandate by rendering impotent the procedural requirements of the National Environmental Policy Act of 1969. What this argument attempts to do is to shift the burdens of considering and evaluating

> the environmental consequences of particular federal actions from the agencies Congress intended to bear them to the public, the beneficiary of this legislation. If these agencies were permitted to avoid their responsibilities under the Act until an individual citizen, who possesses vastly inferior resources, could demonstrate environmental harm, reconsideration at that time by the responsible federal agency would indeed be a hollow gesture. See Arlington Coalition on Transportation v. Volpe. 458 F. 2d 1323 (4th Cir. 1972); Calvert Cliffs' Coord. Comm. v. United States A.E. Com'n., 449 F. 2d 1109, 1128 (D.C. Cir. 1971).
>
> The kind of 'irreparable harm' which must be shown in order to justify the issuance of a preliminary injunction in these cases can be found in the language of the Act itself. As stated in Calvert Cliffs', 'Section 102 of NEPA mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties.'" Id. at 1034.

Similarly, in Environmental Defense Fund v. TVA, 468 F. 2d 1164, 1184 (6th Cir. 1972), the Sixth Circuit, in affirming the grant of a preliminary injunction to halt a dam and reservoir project because of the failure to file an adequate NEPA statement, held:

> "Finally, the preliminary injunction, as we stated earlier in this opinion, is the vehicle by which a declared congressional policy can be effectuated. Sufficient irreparable harm, even apart from the consideration discussed above, can be found in the continuing denial by appellants of appellees' right under the NEPA, and this is enough to justify issuing the injuction". (Citations omitted).

Again in Izaak Walton League of America v. Schlesinger, supra, the District Court, in granting a preliminary injunction to prevent the AEC from issuing an interim operating license for a nuclear power plant because no NEPA statement has been filed, held:

> "The Court also concluded the apparent failure to comply with the statutory mandate of NEPA constitutes irreparable injury to the class of people represented by the plaintiffs. Since the AEC's action significantly affects the quality of the human environment, the irreparable injury is in the form of denial of rights granted to the plaintiffs under that law." 357 F. Supp. at 295.

In ruling on the first and the second preliminary injunction motions, the District Court rejected plaintiff's argument that defendants' violation of their duty under

NEPA itself constitutes irreparable harm and requires the issuance of a preliminary injunction (A. 897, 1198). The Court apparently concluded that the cases cited by plaintiff in support of that argument were distinguishable because the defendants in these cases were disturbing the status quo and the defendants in the instant case were not (A-900-01, 1196-1198).

Plaintiff respectfully submits that this conclusion is erroneous for a number of reasons. This Circuit has characterized the notion that the function of the preliminary injunction is to preserve the status quo as a generality which cannot be mechanically applied. See, National Association of Letter Carriers v. Sombretto, 449 F. 2d 915 (2d Cir. 1971) (per Friendly, J.). In any event, plaintiff maintains that individual federal actions of licensing, approving, allowing or executing, directly or indirectly, the air transport of special nuclear materials constitute separate major federal actions significantly affecting the environment and requiring environmental impact statements. The District Court's reference in its memorandum of September 9, 1975, to "a method of

transporting SNM" and its reference in its memorandum of May 7, 1976, to such "activity" obscures this simple point (A. 901, 1197). Each individual action of defendants here, like the construction of a building or a highway or the activating of a nuclear power plant, does alter the status quo. In short, the instant case cannot be distinguished from the ones relied upon by plaintiff with respect to disturbance of the status quo. Conservation Society of Southern Vermont v. Secretary of Transportation, 508 F. 2d 927 (2d Cir. 1974), relied upon by the District Court, is factually distinguishable from the instant case since there the Court relied upon the fact that the action, a highway interchange project, was at an advanced stage of completion. Id at 936-37.

Moreover, the fact that there have been similar alterations of the status quo in the past does not make the preliminary injunction any less necessary. The District Court's statement that the "method of transporting SNM" has subsisted for twenty-five years or that the "activity" has been engaged in for many years does not provide a basis for the denial of such relief (A. 901, 1197).

Federal agencies have constructed dams even longer than they have licensed, approved, allowed or executed air shipments of plutonium or uranium and that fact has not been an obstacle to injunctive relief.

In seeking to distinguish the cases relied upon by plaintiff, the District Court, also stated in its September 9, 1975, memorandum, that denial of the injunction will not render compliance a hollow gesture (A. 901). To the contrary, to the extent that human life or property is destroyed or otherwise harmed in the interim, subsequent compliance would indeed be hollow. In the Court's May 7, 1976, memorandum, it again ignored this fact when it blandly stated that, once an environmental statement is completed, it would be no more difficult to "effectuate its recommendations" than to do so today (A. 1198). In this latter memorandum, the District Court indicated that, in the cases relied upon plaintiff, denial of injunctive relief would have led to certain change of circumstance whereas in the instant case "the potential damage is not at all so clear" (A. 1196, 98). In doing so, the District Court ignored the Izaak Walton League case cited above, wherein the court merely

noted that the activation of the nuclear power plant raised "alleged dangers" resulting from thermal effluents and accordingly created a "potential" that the environment may be significantly affected and wherein the court did not even require that potential as a basis for its injunctive relief. Izaak Walton League of America v. Schlesinger, supra, at 292, 295.

The District Court, in rejecting the principle that violation of NEPA by the total failure to file any final environmental statements itself constitutes sufficient irreparable harm to require issuance of a preliminary injunction, declared in its May 7, 1976, memorandum that the procedural requirements of NEPA were intended "to make it possible for the courts to determine whether responsible federal agencies are meeting the environmental obligations with which Congress has charged them" (A. 1195; Emphasis supplied). This is an erroneous statement of the law. The CEQ Guidelines have pointed out that the objective of the environmental impact statement requirement of NEPA is to assist agencies in implementing the substantive policies of environmental protection and enhancement set forth in NEPA. 40 CFR § 1500.1. The Guidelines emphasize:

> "This requires agencies to build into their decision-making process, beginning at the earliest possible point, an appropriate and careful consideration of the environmental aspects of the proposed action... ." Ibid.

The objective cited in the CEQ Guidelines is obviously frustrated by allowing federal action subject to NEPA to continue before adequate impact statements are filed. In any event, it would appear that even the courts' abilities to determine whether a federal agency is meeting its other "environmental obligations" would be severely impaired where the agency has failed to meet its obligation to file an environmental impact statement.

The District Court's statement in the May 7, 1976, memorandum that plaintiff had not shown that an injunction would expedite the preparation of an environmental impact statement also misses the point(A. 1198). In any event, it is significant that, while the NRC represented that a final generic impact statement by the NRC would be filed by the summer of 1976 (A. 910, n.4), the NRC, in January 1976 stated that it had postponed the filing date to

October 1976 (A. 1166). Indeed, common sense would suggest that lack of injunctive relief does reduce the incentive for prompt compliance with NEPA.

Plaintiff maintains that, not only does the defendants' violation of their duty under NEPA itself constitute sufficient irreparable harm, but the harm need not be balanced against the claimed effects of the preliminary injunction. Even in a non-NEPA case, Sonesta International Hotels Corporation v. Wellington Associates, 483 F. 2d 247, 250 (2d Cir. 1973), the Second Circuit pointed out that a balancing of the hardships is required only where the party seeking the preliminary injunction fails to show probable success on the merits and merely shows sufficiently serious questions going to the merits to make them a fair ground for litigation.

The District Court in one paragraph of its September 9, 1974, memorandum appeared to recognize that balancing need not occur when probability of success has been shown (A. 897, 1st par.) However, the Court ignored this point in other parts of that memorandum which

indicated that balancing must always occur (A. 897, 2d par.; A. 896) and the court thereby erred as a matter of law.* It similarly erred as a matter of law in the May 7, 1976, decision when it declared that an evidentiary hearing must resolve whether there are any practical alternatives to the shipments which plaintiff seeks to enjoin (A. 1200).

In the case at bar, success on the merits is more than probable, indeed certain. Accordingly no balancing of hardships is called for.

The use of a balancing test is particularly inappropriate where the preliminary injunction is sought in a NEPA case. In Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F. 2d 1109 (D.C. Cir. 1971), the District of Columbia Circuit, in ordering that the Atomic Energy Commission must revise its rules governing consideration of environmental issues, declared:

* Moreover, the Court erred as a matter of law in that memorandum when it merely assumed arguendo that "sufficient likelihood of ultimate success" had been shown without specifying the standard which it was assuming had been met, i.e., "probable success" or merely "serious questions" (A. 897).

"The Commission appears to recognize the severe limitation which its rules impose on environmental protection. Yet it argues that full NEPA consideration of alternatives and independent action would cause too much delay at the pre-operating license stage. It justifies its rules as the most that is 'practicable, in the light of environmental needs and "other essential considerations of national policy"'. It cites, in particular, the 'national power crisis' as a consideration of national policy militating against delay in construction of nuclear power facilities.

The Commission relies upon the flexible NEPA mandate to 'use all practicable means consistent with other essential considerations of national policy.' As we have previously pointed out, however, that mandate applies only to the substantive guidelines set forth in Section 101 of the Act. See page 1114 supra. The procedural duties, the duties to give full consideration to environmental protection, are subject to a much more strict standard of compliance. By now, the applicable principle should be absolutely clear. NEPA requires that an agency must--to the fullest extent possible under its other statutory obligations--consider alternatives to its actions which would reduce environmental damage." Id. at 1127-28.

The case at bar also involves one of the procedural duties of NEPA, that of filing an environmental impact statement prior to action. Just as in Calvert Cliffs', other considerations of national policy are irrelevant. Strict compliance with NEPA requires that the federal action be enjoined in the absence of a statement.

This Circuit has recently cited and approved the approach of Calvert Cliffs' in Natural Resources Defense Council, Inc. v. NRC, Docket Nos. 75-4276, 75-4278 (2d Cir. May 26, 1976). In that case this Circuit, among other things, prohibited the NRC from licensing the commercial scale transportation, by any mode, of plutonium and uranium in various stages of the process of fabricating mixed oxide fuel, until a full environmental impact statement had been filed. The fabrication of mixed oxide fuel from the radioactive waste materials resulting from nuclear power plants was intended to produce an additional source of nuclear energy. Id. at 5. This Court declared:

> "It is undisputable that the motives of the Commission, to develop new sources of energy and to recycle dwindling uranium reserves, are highly commendable; however, those national needs cannot outweigh the far-reaching national concerns embodied in NEPA. 'Considerations of administrative difficulty, delay or economic cost will not suffice to strip [NEPA] of its fundamental importance'. Calvert Cliffs', supra, 449 F. 2d at 1115." Id. at 40.

Accordingly, the District Court in its decision of September 9, 1975, erred as a matter of law when it concluded that the balance of hardships weighed against plaintiff because of other matters of "public interest" (A. 905).

D. Even if defendants' violation of NEPA itself would not require issuance of a preliminary injunction, the facts admitted by defendants alone, as well as all the facts, amply demonstrate the possibility of irreparable harm and require the issuance of a preliminary injunction.

It was held last year by Hon. Robert J. Ward in a NEPA case affirmed by the Second Circuit that a preliminary injunction merely requires a showing of possible irreparable injuy when probable success on the merits has been shown. See, Chelsea Neighborhood Ass'ns v. U.S. Postal Service, supra, at 1185 (emphasis supplied). Accord, Natural Resources Defense Council, Inc. v. Morton, 458 F. 2d 827, 832 (D.C. Cir. 1972). This is the law in the Second Circuit in non-NEPA cases as well. See, Sonesta International Hotels Corp. v. Wellington Associates, supra at 250. The District Court erred as a matter of law in its decision of September 9, 1975, because it required a higher degree of likelihood of irreparable injury (A. 902-05).

It is ironic that the District Court would choose a case in which the irreparable harm could consist of the deaths of millions of people to caution against considering "remote" possibilities (A. 910, n. 5). Indeed, one would

think that, if anything, even extremely remote possibilities would be sufficient where the "environmental harm" would consist of the loss of many human lives rather than, for example, mere damage to aesthetic values.

In Natural Resources Defense Council, Inc. v. NRC, supra, this Circuit in prohibiting the transport of plutonium and uranium in the process of mixed oxide fuel fabrication unhesitatingly characterized such transport as "transportation of a deadly and highly radiotoxic nuclear material" (Id. at 38) and emphasized:

> "Further transportation will be unrestricted and therefore the widest possible number of persons will be exposed to the possibility of a nuclear incident before the release of the supplement on safeguards." Id. at 34 (Emphasis supplied).

Moreover, this Circuit has noted in a non-NEPA case involving the transport of hazardous materials, including SNM:

> "The issues underlying this litigation are of considerable importance since they involve the transportation by air of hazardous materials and therefore the implicit menace to human life." Air Line Pilots Association, et al. v. CAB, 516 F. 2d 1269, 1270 (2d Cir. 1975).

Moreover, under any standard of irreparable harm, the District Court erred in concluding that insufficient possibility of irreparable harm had been established.

As to both terrorism and aircraft accidents, a review of the affidavits and other materials in the appendix, some of which were referred to at pages 9-24 above, will make it clear that even defendants have admitted a greater possibility of harm than the District Court was willing to recognize.

In its decision on the second preliminary injunction motion, the Court characterized the dangers of SNM air transport as "mathematically very remote" (A. 1198-9). In its decision on the first preliminary injunction motion, it characterized the aircraft accident hazard as "extremely remote" (A. 903).

This point was anticipated by Mr. Pinkel who concluded:

> "To argue that the chance of an airplane accident is small and that a nuclear material spill from the present container in such an accident is also small so that one can ignore the residual risk is a fallacious position for responsible people. With the marked increase in the volume of such shipments, the probability of becoming involved in an accident is growing." A. 621.

To argue remoteness of the harm gives a complete misimpression of the true risks involved. The chances are probably statistically remote for seat-belted passengers to be lost from a cabin in flight. Yet, Mr. Pinkel points out that they have been lost (A. 621). Similarly, the probability of an inadvertent dropping of nuclear weapons from a military plane, considering multiple backup safeguards systems for weapons, would undoubtedly be extremely remote. However, two nuclear bombs have been inadvertently dropped over Spain (A. 621, 618, 583).

The District Court relied upon the claimed fact that during the past twenty-five years there has never been an aircraft accident involving a release of SNM (A. 903). Whatever else might be said about this claim, such reliance is totally unwarranted. As Mr. Pinkel has pointed out, the fact that no significant plutonium accident of the type discussed has yet occurred can only be considered fortunate (A. 629). He has pointed out that in statistical probabilities a one-in-a-million chance event may occur on the first trial or on the two millionth trial and that we could not afford the "worst case" consequences whenever they occur (A. 629).

The District Court (A. 904, 1207) also took comfort in certain legislation restricting air shipments of plutonium by ERDA. Public Law 94-187, 94 Cong. 2d Sess. §§ 501-02 (Dec. 31, 1975), U.S. Code Cong. & Admin. News, January 30, 1976 [set forth in Addendum "B"]. This ERDA law differed significantly from the law restricting air shipments of plutonium by NRC licenses, also referred to by the Court (A. 903, 1207). Public Law 94-79, 94th Cong. 1st Sess. § 201 (Aug. 9, 1975); U.S. Code Cong. & Admin. News, January 30, 1976 [set forth in Addendum "B"].

The ERDA law is riddled with exemptions. It exempts from the law's restrictions air shipments of plutonium which, pursuant to rules promulgated by ERDA, are determined to be made for the purposes of "national security, public health and safety, or emergency maintenance operations," as well as shipments of "small" amounts of plutonium deemed by ERDA to require rapid shipment by air in order to preserve its chemical, physical or isotopic properties and shipments in any form designed for medical application. When ERDA promulgated regulations regarding the "national security" exemption, it did so without prior notice and wrote with a predictably sweeping hand. 41 Fed. Reg. 6529 (Feb. 12, 1976) [set forth in Addendum "C"]. In

effect, any shipment plutonium shipments having any relation to nuclear weapon programs were said to be made for the purpose of national security. Certainly, the ERDA law has exempted many potential shipments. During one six month period prior to the adoption of the ERDA law more than 90% of ERDA's domestic air shipments of SNM were related to defense programs (A. 233). Defendants admit that there were 13 air shipments of plutonium under the national security exemption between the time the ERDA law was adopted and April 13, 1976 (A. 1187).

It must be emphasized that both the NRC and the ERDA laws apply only to plutonium, not to uranium.

The District Court said little regarding terrorism except that it believed that air transport of SNM was less vulnerable to terrorism than surface transport (A. 904-05), a point which will be discussed in the next portion of this brief. In this connection, it must be remembered that uranium, as well as plutonium, presents the hazard. As indicated above at pages 10 to 18, even defendants have admitted the possibility of harm resulting from terrorism.

The error of the District Court in denying injunctive relief is evident in light of this Circuit's recent decision in Natural Resources Defense Council, Inc. v. NRC, supra, which, inter alia, prohibited the transport of plutonium and uranium in the plutonium recycle process. This Court noted the "possible adverse environmental effects, as well as the clearly hazardous consequences of theft, diversion or sabotage of plutonium." Id. at 32. It cited the fact that General Atomic Company had stated that transportation is the weakest link of any safeguards chain and that Northeast Energy Company had urged that military guards be provided for the recycle process and particularly for the transportation link. Id. at 12.

This Court quoted with approval a letter from CEQ to NRC which informed NRC that it had failed, inter alia, to adequately address the danger of sabotage and theft posed by the transport of SNM (Id. at 10) and which declared:

> "'The potential impact of the diversion and illicit use of special nuclear materials are well recognized. This threat is so grave that it could determine the acceptability of plutonium recycle as a viable component of this Nation's nuclear electric power system. Thus, we believe that the NRC, the Executive Branch, the Congress, and the American people

should have the benefit of a full discussion of the diversion and safeguards problem, its impacts, and potential mitigating measures, before any final decisions are made on plutonium recycle.'" Id. at 29.

E. Even if the possible irreparable harm is balanced against the claimed effects of the preliminary injunction, the issuance of the preliminary injunction is required on this record.

It must be emphasized that even if this Court makes the assumption, as did the District Court (A. 909), that SNM must continue to be transported by some mode, this would not require plaintiff to demonstrate that the air transportation of SNM is more dangerous than other modes. (See pp. 48A-51 above). Moreover, in Izaak Walton League of America v. Schlesinger, supra at 295, defendants claimed that the plaintiff had not met the argument that the nuclear plant in question was needed to abate air-pollution from certain coal-burning generating units. The Court, in enjoining the AEC from issuing an interim operating license for the nuclear plant, rejected the argument and said: "To substitute the possibility of one form of threat to the environment for another form is unacceptable." So also here defendants are in no position to argue that, although air transportation of SNM presents the possibility

of irreparable environmental harm, plaintiff must also show that this environmental harm is worse than that resulting from the use of other modes of transportation. The District Court erred as a matter of law in placing a burden upon plaintiff to show that air transport of SNM is more hazardous than surface transport (A. 906).

Nevertheless, plaintiff has demonstrated that commercial air transportation is sufficiently more hazardous than other modes, both from the standpoint of accidents and terrorism.

First of all, plaintiff has demonstrated that, from the standpoint of accidental dangers, air transport poses a far greater risk to the environment than surface modes (A. 630, 698-700). This is due primarily to the nature of actual aircraft crash environments which, generally, are far more severe than those crash environments experienced in surface transport. The District Court's position on this point is internally contradictory. Although the Court, in its September 9, 1975, decision, erroneously criticized plaintiff's experts for having substantially ignored the accident hazards of alternative forms of transport (A. 905), the Court itself concluded that "common sense as well as the

affidavits filed in this action attest to the fact that containers would more likely be breached in the crash of an aircraft than that of a surface vehicle"(A. 903).

From the standpoint of vulnerability to terrorism, commercial air transport and related connecting transport have also been demonstrated to be notably inferior to other transportation options. Mason and Leamer concluded:

> 1) That the U.S. Military has the safeguards capability to transport SNM on the surface and that such material would be quite well shielded from terrorist action;
>
> 2) That use of military bases as points of shipment or receipt, and as interim storage points between water and land transport modes, can provide a relatively high degree of physical security to SNM in transport; and
>
> 3) That accordingly there are surface transportation options for the movement of SNM which are significantly less vulnerable to terrorist action than commercial air and related transport (A. 969-70).

The District Court, in its September 9, 1975 decision, stated that plaintiff's experts had substantially ignored the terrorist hazard attendant upon alternative forms of transport (A. 905). To the contrary, plaintiff respectfully submits that the District Court had totally and

erroneously ignored the above military surface transport option which already had been presented to the Court by Messrs. Mason and Leamer. It is significant that in its May 7, 1976, decision, the District Court stated that plaintiff suggested the military surface transport option in an apparent response to the Court's September 1975 decision (A. 1199-1200) when in fact it had been presented to the Court in June 1975.

As to uranium, which does not present the same aircraft accident threat as plutonium, Mason and Leamer established, without contest by defendants, that there are five military assisted air transportation alternatives which are far less vulnerable to terrorist action than present commercial transport (A. 1034-38). The least vulnerable alternative was that utilizing long haul military air cargo, leaving from and flying into a military airfield, and connecting which short haul military helicopter service between the airfield and the origin/ultimate destination (A. 1034, 1036-37).

Just as plaintiff need not establish that air transport of SNM is more hazardous then surface transport, so also it need not establish that the irreparable harm

resulting from air transport of SNM outweighs the "public interest" in domestic research projects and energy facilities and foreign use referred to by the District Court (A. 905) (see pages 48A-51 above).

In any event, plaintiff made it clear at the outset that this action does not seek a halt to all transportation of SNM. It seeks only a halt to air and related connecting transport. The District Court erred when it overlooked the simple fact that the requested injunction would not prevent the domestic shipments to research projects and energy facilities and the foreign shipments to which it referred (A. 905).

In the case of both domestic and foreign shipments, the best reasons for the use of air transport that defendants could even suggest were speed, convenience and cost effectiveness. Few words are required to emphasize that those reasons do not even approach the level to warrant the risk of the loss of huge numbers of human lives.* For

* One is even more astonished at the reason given for the use of John F. Kennedy Airport in New York City, namely, that "JFK is the major international airport on the East Coast" (A. 238).

example, how compelling is the difference between a 5-6 day trip to Europe by sea and an 8 hour trip by air?

For all its concern about the importance of SNM transport (A. 905), the District Court overlooked Mr. Pinkel's observation that a disaster of any magnitude involving such material would undoubtedly have the effect of generating extremely adverse public reaction and possibly a halt to all progress in nuclear energy (A. 621-22, 629). It is, in Mr. Pinkel's words, "in the best interest of all parties that shipments by air utilizing the present containers be terminated. . ." (A. 630).

There has not ever been evidence that the "national security" shipments of plutonium of ERDA require air transport. Plaintiff emphasizes that it has not sued the Department of Defense and does not seek to prevent the carriage of nuclear weapons in military aircraft for strategic and tactical purposes. The shipments by ERDA, however, are not such shipments. There has been no demonstration by defendants that the conduct by ERDA of what are essentially supply and maintenance functions in peacetime requires air shipment.

It would be a grim irony if the air shipment of materials related to the prevention of an attack by a foreign power itself would result in the loss of millions of lives. Dr. Gofman has pointed out that dispersal of even a minute amount of plutonium in the New York City area might require evacuation of the city and concluded:

> "The economics and social implications of this for the people of New York, for the economy of New York, and for the economy of the country would represent a peacetime disaster unparalleled in the history of the U.S.A." (A. 650-61).

Courts have not hesitated to enjoin federal activities of greater importance to the nation as a whole than air shipments of SNM, even where the possible harm did not directly involve human life. Thus, in National Resources Defense Council, Inc. v. Morton, supra, where an inadequate environmental impact statement was filed, the District of Columbia Circuit affirmed a preliminary injunction which halted the sale of oil and gas leases of some 80 tracts on the Outer Continental Shelf comprising almost 380,00 acres. The Court did so notwithstanding a national energy crisis and notwithstanding that the sale was responsive to a directive of the President. 458 F. 2d at 829, 830, 835.

Similarly, the District of Columbia Circuit enjoined federal approval of strip mining plans, and associated use of federal land for a railroad right-of-way, for a number of nationally important coal mines pending a determination whether, in addition to individual impact statements already filed, a statement was required on the environmental impact of strip mining on the entire Powder River Basin coal field in 4 states. Sierra Club v. Morton, 514 F. 2d 856 (D.C. Cir. 1975), cert. granted, 44 U.S.L.W. 3397 (January 12, 1976 [No. 75-552]).

Even defense related activities have been enjoined. In Natural Resources Defense Council v. Callaway, et al., 524 F. 2d 79 Cir. 1975), this Circuit directed that the United States Navy and Army be enjoined from further dumping of dredged spoil from the Thames River in Long Island Sound. The dredging/dumping project was being carried out so as to allow the Navy's introduction and deployment of a new class of attack submarine. The primary ground for the Second Circuit's reversal of the District Court was the federal government's failure to comply with NEPA and draft an adequate impact statement supplement. The dissenting opinion in that case acknowledged the fact that the majority's

directive would delay the Navy's program. Id. at 97. Accord, People of Enewetak v. Laird, 353 F. Supp. 811 (D. Hawaii, 1973).

Finally, it is worth emphasizing that this Circuit did not hesitate to prohibit the commercial scale transport, by any mode, of plutonium and uranium in the plutonium recycle process until a full environmental import statement had been filed. It did so even though it took note that the purpose of the NRC was to develop new sources of energy to fulfill a national need. National Resources Defense Council, Inc. v. NRC, supra at 40.

Plaintiff submits that the District Court clearly erred as a matter of fact and law in denying plaintiff the requested preliminary injunction.

II. THE DISTRICT COURT ERRED IN DENYING PLAINTIFF SUMMARY JUDGMENT WHICH DECLARES THAT DEFENDANTS HAVE VIOLATED NEPA AND THE CEQ GUIDELINES AND WHICH DIRECTS THAT DEFENDANTS COMPLY WITH THE LAW.

Plaintiff clearly is entitled to summary judgment which declares that defendants have violated NEPA and the CEQ Guidlines by failing to file required Environmental Impact Statements. There is no genuine issue of fact and plaintiff

entitled to such relief as a matter of law.

As pointed out in Argument I.B. above, with the exception of the CAB and Customs, which moved to dismiss the complaint with respect to them, the defendants have not seriously contested that they have violated NEPA by failing to file environmental impact statements. Even the CAB and Customs at page 5 of their undated memorandum of law in support of dismissal conceded that no facts were at issue.

In paragraph 19 of defendants' answer (A. 92), they denied the allegation of paragraph 45 of the complaint (A. 20), which alleged that they have violated the law by not complying with NEPA impact statement requirements prior to taking licensing and other actions. As recently as in Defendants' Memorandum of Law, dated January 9, 1976, p. 11, they assert that they do not concede that they are in violation of NEPA.

Pleadings are to be considered on a motion for summary judgment, but they do not have controlling force. 6 Moore, supra ¶ 56.15[2] at 2332. Therefore, unsubstantiated allegations in pleadings, such as defendants bland denial of of having violated NEPA or CEQ Guidelines in the Answer to the

Complaint, are not sufficient by themselves to warrant a denial of the motion.

It has been said:

> "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial."
> Richard v. Credit Suisse, 242 N.Y. 346, 152 NE 110 (1926) (per Cardozo, J.) quoted in 6 Moore, supra ¶ 56.04[1] at 2057.

The District Court did not deny summary declaratory relief because of any factual issue. Indeed, the District Court noted that defendants had failed even to posit an argument to show that they were not in violation of NEPA (A. 1206).

The District Court erroneously denied this declaratory relief because such relief would not necessarily require the granting of an injunction and thus would not end the case (A. 1193). It has been authoritatively stated:

> "When injunctive relief is sought as well as declaratory judgment, the fact that injunctive relief is not appropriate under the circumstances does not justify dismissal of the action; the

> court must give independent consideration to the court [sic] for a declaration of rights...." 6A Moore, Federal Practice ¶57.08[2], at 57-40 (2d ed. 1974)

Indeed, the reasoning of the District Court in denying summary declaratory relief amounts to an erroneous rejection of declaratory judgment claim in its entirety. This is a clear error of law since there is obviously a substantial and immediate controversy between the parties which should be the subject of a declaratory judgment. See, e.g., Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974). The District Court cannot avoid its responsibility by seeking to characterize defendants' violations as "technical" (A.1193). As demonstrated above, the violations go to the heart of the NEPA process. The District Court's error is especially clear in light of the fact that the Federal Declaratory Judgment Act, 28 U.S.C. §2201, is remedial in nature and is to be construed liberally. 6A Moore, op. cit. supra, § 57.09.

The State of New York also moved that the summary judgment direct that defendants make available a draft generic Environmental Impact Statement concerning the trans-

port of all special nuclear materials to, from, in or over the City and State of New York and the United States and its territories on or before December 31, 1975, that defendants hold hearings thereon during March 1976 in various parts of the country, including New York City, and accept comments thereon through March 31, 1976, and that defendants file an adequate final generic Environmental Impact Statement concerning the transport of all special nuclear materials to, from, in or over the City and State of New York and the United States and its territories on or before June 21, 1976.

The dates selected for making available a draft statement and for filing a final statement should not have been burdensome to the defendants, since the Court noted at footnote 4 of its memorandum of September 9, 1975, that it had been represented to the Court that the draft would be available by the end of 1975 and the final by the summer of 1976 (A.910). The inclusion of dates for making available the draft and for hearings and the submission of comments by interested parties thereon was designed to assure that the date for filing the final statement will not be used as an excuse to curtail the study and comment which a draft statement on this important study.

The fact that defendants did not adhere to their own schedule should have emphasized the need for the District Court to grant summary mandatory relief.

Instead, the District Court excused the delay because it concluded that it had been occasioned by an expansion of the scope of the impact statement (A.1194). This conclusion was based on a claim by the NRC that a cause of delay was that the scope of the impact statement was broadened to include all modes of transport. However, this is unpersuasive, since the NRC original notice announcing that the statement would be prepared indicated that all modes would be discussed. 40 FR 23769, 23770 (June 2, 1975).

Even though a draft generic environmental statement was made available by NRC some three months after the promised date, 41 Fed. Reg. 12937 (March 29, 1976), there is vitality to plaintiff's motion for summary mandatory relief. Contrary to the District Court's statement (A.1194), the NRC announcement cited above does not set a schedule for hearings at any locations. Moreover, no firm date for the issuance of a final statement was given therein. Plaintiff

requests that dates certain be set. It must be remembered that defendants have been under an obligation to file impact statements since 1969, when NEPA became law.

This requested relief, which is in the nature of mandamus, is obtainable by motion. Rule 81(b) of the Federal Rules of Civil Procedure. Such relief is appropriate where, as here, a government official fails to comply with a specific statutory or regulatory direction. Lyons v. Weinberger, 376 F. Supp. 248, 255 (SDNY, 1974).

Indeed, on remand in Scientists' Institute for Public Information v. A.E.C., supra, the District Court entered an order similar to the judgment requested here. Defendants then were directed to issue a draft environmental impact statement and a final environmental statement by specified dates. Order filed July 13, 1973, Scientists' Institute for Public Information v. A.E.C., D.D.C. Civ. No. 1029-71.

III. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT WITH RESPECT TO THE CAB AND CUSTOMS.

For the purpose of the motion to dismiss, the material allegations of the complaint of the CAB and Customs must be taken as admitted. See 2A Moore, Federal Practice § 12.08, at 2266-67 (2d ed. 1974). A cause of action should not be dismissed for insufficiency "unless it appear to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." Id., at 2271, 2274 (emphasis in original). In this connection a complaint is to be liberally construed. Id., at 2274.

The complaint contains sufficient allegations that defendants CAB and Customs take actions which permit the air transport of SNM (A. 10, 11, 13, 19). The District Court noted that the following had been conceded by the CAB and Customs:

A. Customs permits the entry into the United States of air transported SNM.

B. The CAB grants certificates of convenience and necessity and passes on tariff applications.

C. The promotion of air safety is a policy of the CAB.

D. The CAB and Customs assure compliance with DOT/FAA or NRC regulations.

E. The CAB and Customs assure that air carriers have valid NRC licenses or qualify for an exemption pursuant to NRC regulation (A. 923-24).

The allegation in the complaint (A. 13) that Customs clears and permits entry of imports of SNM charges a major federal action. So also, the allegation in the complaint (A. 13) that the CAB is charged with the policy of promoting air safety and regulates air shipping, including that of SNM, alleges a major federal action. This regulation includes, among other things, granting certificates of convenience and necessity and passing on tariffs.

All that was said above at pages 36 to 38 regarding the broad construction of the term "major Federal actions" is relevant here. As indicated, "action" may involve permitting activity, regulating activities or simply having a policy. 40 CFR § 1500.5(a)2. and 3. Moreover, individual agencies may have limited roles in an action which is nevertheless a major action. Id. § 1500.6(a).

The District Court erred, as a matter of law, when it attached no legal significance to the complaint's allegations that Customs permits entry of SNM into the United States and that the CAB is charged with the policy of promoting air safety, grants certificates of convenience and necessity and passes on tariff applications. The Court misread the complaint as alleging only that the CAB and Customs enforce the directives of other agencies (A. 924).

The Court also erroneously assumed that CAB and Customs have no independent responsibility regarding the environmental effects of air transport of SNM (A 924-25). However, the District of Columbia Court has pointed out:

> "NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. The AEC, for example, had continually asserted, prior to NEPA that it had no statutory authority to concern itself with the adverse environmental effects of its actions. Now, however, its hands are no longer tied. It is not only permitted but compelled to take environmental values into account. Perhaps the greatest importance of NEPA is to require the AEC and other agencies to consider environmental issues just as they considered other matters within their mandates." Calvert Cliffs Coordinating Committee, Inc. v. AEC, 449 F. 2d 1109, 1112, (D.C. 2nd Cir. 1971). (Emphasis added).

The District Court's treatment of the CAB is particularly inappropriate, since it is the CAB, not some other agency, which has directed air carriers to transport SNM against their will. When Trans World Airlines, Inc., proposed a tariff revision refusing to accept certain fissile materials which included plutonium 238, 239 and 241 and uranium 233 and 235, all forms of SNM, the CAB rejected the proposed revision and stated that "we believe that TWA's common carrier responsibilities require that the airline accept such shipment. . . ." CAB Order 74-6-77, adopted June 14, 1974, p. 4 (A. 920). The CAB required TWA to accept SNM even though, as plaintiff has alleged, the CAB is charged with promoting safety in air commerce and even though the CAB claims that it has a policy of promoting air safety. Moreover, the CAB acted in the face of TWA's pleads "that shipments of such materials are so potentially hazardous that such articles should not be transported, and continued acceptance would be 'counterproductive to safety.'" CAB Order 74-6-77, supra, p. 4 (A. 920).

It is interesting to note that, in Airline Pilots Association v. CAB, supra, referred to by the Court, that

the CAB did not claim that it lacked responsibility for regulation of air safety. Id., at 1275. More importantly, the CAB claimed the statutory responsibility to reject the airline embargoes on transport of hazardous materials, including SNM. Ibid. Thus this case is merely another example of the regulatory action of the CAB with regard to SNM.

In light of the fact that CAB and Customs clearly are subject to NEPA because they took and participated in major federal actions significantly affecting the environment, plaintiff is entitled to proceed with its cause of action against them and seek injunctive and declaratory relief. In the case of the CAB, injunctive relief in accord with the plea set forth in the complaint would require the CAB, in the exercise of its authority regarding tariffs and certificates of public convenience and necessity, to prohibit certified air carriers from transporting SNM. In the case of Customs, injunctive relief would require Customs to take all appropriate steps to prevent imports of SNM by air. Since Customs is informed of such imports in advance (A. 937), it should be required to immediately inform the carrier and

the shipper that transport by air is prohibited. In addition Customs, of course, should be required to publicize this prohibition, as it publicizes other restrictions on imports into the United States.

Plaintiff submits that the District Court erred as a matter of law in dismissing the complaint with respect to the CAB and Customs.

CONCLUSION

THE DISTRICT COURT'S ORDERS OF SEPTEMBER 9, 1975, DECEMBER 23, 1975, AND MAY 7, 1976, SHOULD BE REVERSED IN ALL RESPECTS. PLAINTIFF SHOULD BE GRANTED PRELIMINARY INJUNCTIVE RELIEF AND SUMMARY DECLARATORY AND MANDATORY RELIEF AGAINST ALL DEFENDANTS. THE COMPLAINT SHOULD BE REINSTATED WITH RESPECT TO THE CAB AND CUSTOMS AND THEY SHOULD BE DIRECTED TO ANSWER.

Dated: New York, New York
June 2, 1976

Respectfully submitted,

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ADDENDUM "A"

NEPA § 102(c)
[42 U.S.C.A. § 4332(c)]

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall --

(C) include in every recommendation or report on proposals for legislation and other major Federal actions signficantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processess;. . .".

ADDENDUM "B"

Public Law 94-79, 94th Cong. 1st Sess. § 201
(August 9, 1975)
(U.S. Code Cong. & Admin. News Sept. 25, 1975)

"The Nuclear Regulatory Commission shall not license any shipments by air transport of plutonium in any form, whether exports, imports or domestic shipments: Provided, however. That any plutonium in any form contained in a medical device designed for individual human application is not subject to this restriction. This restriction shall be in force until the Nuclear Regulatory Commission has certified to the Joint Committee on Atomic Energy of the Congress that a safe container has been devloped and tested which will not rupture under crash and blast-testing equivalent to the crash and explosion of a high-flying aircraft".

Public Law 94-187, 94th Con. 2d Sess. §§ 501-02
(December 31, 1975)
(U.S. Code Con. & Admin. News, January 30, 1976)

"Sec. 501. The Energy Research and Development Administration shall not ship plutonium in any form by aircraft whether exports, imports, or domestic shipment: Provided, That any exempt shipments of plutonium, as defined by section 502, are not subject to this restriction. This restriction shall be in force until the Energy Research and Development Administration has certified to the Joint Committee on Atomic Energy of the Congress that a safe container has been developed and tested which will not rupture under under crash and blast testing equivalent to the crash and explosion of a high-flying aircraft.

Sec. 502. For the purposes of this title, the term 'exempt shipments of plutonium' shall include the following:

(1) Plutonium shipments in any form designed for medical application.

(2) Plutonium shipments which pursuant to rules promulgated by the Administrator of the Energy Research and Development Administration are determined to be made for purposes of national security, public health and safety, or emergency maintenance operations.

(3) Shipments of small amounts of plutonium deemed by the Administrator of the Energy Research and Development Administration to require rapid shipment by air in order to preserve the chemical, physical, or isotopic properties of the transported item or material."

ADDENDUM "C"

41 Fed. Reg. 5259 (February 12, 1976)

CHAPTER III—ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

PART 871—AIR TRANSPORTATION OF PLUTONIUM

National Security Exemption

Public Law 94–187, which was approved on December 31, 1975, and authorizes appropriations to the Energy Research and Development Administration (ERDA) for Fiscal Year 1976, restricts air transportation of plutonium by ERDA as follows:

SEC. 501. The Energy Research and Development Administration shall not ship plutonium in any form by aircraft whether exports, imports, or domestic shipment: *Provided*, That any exempt shipments of plutonium, as defined by section 502, are not subject to this restriction. This restriction shall be in force until the Energy Research and Development Administration has certified to the Joint Committee on Atomic Energy of the Congress that a safe container has been developed and tested which will not rupture under crash and blast testing equivalent to the crash and explosion of a high-flying aircraft.

SEC. 502. For the purposes of this title, the term "exempt shipments of plutonium" shall include the following:

• • • • •

(2) Plutonium shipments which pursuant to rules promulgated by the Administrator of the Energy Research and Development Administration are determined to be made for purposes of national security, public health and safety, or emergency maintenance operations.

• • • • •

To implement section 502(2) of Pub. L. 94–187 with regard to air shipments of plutonium for purposes of national security, the following rules are hereby promulgated:

§ 871.1 National Security Exemption.

(a) Air shipments of plutonium shall be determined to be made for purposes of national security when they are in support of any of the following activities:

(1) Production, sampling, maintenance, modification, repair, or retirement of nuclear weapons for or from the nuclear weapons stockpile;

(2) Programs for the testing of nuclear devices or weapons; or

(3) Transfer of materials pursuant to international agreements for cooperation for mutual defense purposes.

(b) Determinations pursuant to these rules shall be made by the responsible ERDA program officials, and such determinations shall be matters of record.

Because continuation of the above activities without interruption is essential to the maintenance of the national defense, I have found that general notice of proposed rule making and the public procedure thereon would be contrary to the public interest; and that good cause exists why these rules should be made effective without the customary period of notice. Accordingly, these rules are effective on February 12, 1976.

Interested persons may submit comments on these rules to the Assistant Administrator for National Security, Energy Research and Development Administration, Washington, D.C. 20545. Comments received will be considered in determining whether revision of these rules may be advisable.

(Pub. L. 94–187, Pub. L. 93–438, §§ 2, 3, 91, 123, and 161 p. of the Atomic Energy Act of 1954, as amended.)

Dated at Washington, D.C., this 9th day of February, 1976.

ROBERT C. SEAMANS, Jr.
Administrator.

[FR Doc.76–4243 Filed 2–11–76;8:45 am]

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief For Plaintiff Appellant were served on counsel for defendants this 2nd day of June, 1976.

JOHN F. SHEA, III
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief For Plaintiff Appellant were served on counsel for defendants this 2nd day of June, 1976.

John F. Shea III

JOHN F. SHEA, III
Assistant Attorney General